

No. 17500

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JOE DRAGICH and VAN CAMP SEA FOOD COMPANY, INC.,

*Appellants,*

*vs.*

NIKOLA STRIKA,

*Appellee.*

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## APPELLANTS' OPENING BRIEF.

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**APPELLANTS' OPENING BRIEF.**

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**Introduction.**

The Appellants were the Respondents below. The Appellee was the Libelant below. In the brief, the parties will be referred to as they stood in the Trial Court, and the following symbols will be used:

“T. R.” for “Transcript of Record”

“p.” for “page” and “pp.” for pages”

All emphasis is ours unless otherwise indicated.

**Statement of Pleadings and Jurisdictional Facts.**

This Libel in Personam was instituted in the U. S. District Court by appellee, Nikola Strika, a California resident, against appellants, Joe Dragich, an individual residing in California, and Van Camp Sea Food Com-

pany, Inc., a California Corporation, to recover maintenance and wages allegedly due by reason of the fact that appellee fell ill while employed as a fisherman by the appellants. [T. R. pp. 3-7.] A Libel for maintenance, cure and wages being historically maritime, Federal jurisdiction was invoked under the General Admiralty and maritime jurisdiction of the District Court of the United States. (28 U. S. C., Sec. 1333.)

This is an appeal by the Appellants from a judgment of the United States District Court in and for the Southern District of California, Central Division, decreeing that appellee recover from appellants the sum of \$5,423.34, together with costs entered on April 11, 1961 [T. R. p. 13], after the case was submitted for trial by the Court without a jury, and it rendered its findings of fact and conclusions of law, upon which it entered the above judgment. [T. R. pp. 11-13.] A motion for a new trial [T. R. p. 14] based in part upon the attached oral findings of fact made by the Honorable Trial Court [T. R. pp. 15-24] was filed by appellants on April 20, 1961, and on May 17, 1961, the Court's Order denying the Motion for a New Trial was filed. [T. R. p. 25.]

This appeal followed, having been commenced by a Notice of Appeal from this judgment which was timely filed on June 2, 1961 [T. R. p. 25], together with Appellants' Statement of Points on Appeal. [T. R. p. 26.]

The jurisdiction of this Court to entertain this appeal is founded upon 28 U. S. C., Section 1291, which confers appellate jurisdiction in Admiralty cases upon the United States Court of Appeals.



### Statement of the Case.

Nikola Strika, Libelant, had been a fisherman for thirty years, having fished six years in the old country and twenty-four years on the California and Mexican fishing grounds. He is a big man, heavy and obese, who moves and works slowly. He is 49 years old. In September of 1959 he started fishing aboard the *Liberator*, a commercial fishing vessel with a crew of eleven fishermen under the command of Respondent, Joe Dragich, master of the vessel. Libelant was discharged by Mr. Dragich on January 18, 1960, when the crew demanded that he relieve him of his duties because he was slow and could not do the work required and keep up with the others. Libelant returned shortly thereafter with a "fit for duty" slip from the U. S. Public Health Service, dated January 18, 1960, to prove that he was all right because he was trying to go out for more fishing and he felt pretty fair. Mr. Dragich refused to rehire him.

Libelant, after extensive tests and examinations is found to be suffering from Parkinson's Disease. His medical history and all the evidence bearing on the issue indicate that the condition was one which existed prior to his signing on the *Liberator* and had been in existence during the times that the U. S. Public Health Service had examined him and found him fit for duty in 1947, 1948, and on January 18, of 1960, after he was discharged. He had suffered from heat prostration on his second and last voyage, but this incident did not constitute an illness and it is in no way connected to or related to the pre-existing Parkinson's Disease. The oral findings of the Honorable Court below are somewhat clouded by the Court's examination of whether or not Libelant was discharged for

cause on January 18, 1960, but the analysis and review of the evidence bearing on the issue of whether or not the Libelant fell ill while in the service of the vessel was so well done that it brings the picture of this case into exact and perfect focus:

The Court: This is a very unusual case. In a sense it appears on the surface to be just the ordinary case for maintenance and cure and for wages, but it has an element in it, of course, that makes it entirely different, and that's the fact that he was discharged. \* \* \*

Frankly, it appears to me from the evidence that he did not fall ill in the service of the ship. But it also appears to me that he was not discharged for cause. \* \* \*

\* \* \* with respect to his illness, he wasn't ill at the time he left the service of the ship.  
\* \* \*

If you would call it an illness, he was ill before he went on the ship, but he was not ill in the sense that he could not work. From your own argument he could work at the time that he went on the ship. For instance, the report that you refer to is very significant. He, himself, the history given by the libelant himself, 'The patient is a 49 year old American seaman *who has noticed in the past two years inability to laugh, thick speech, slowing of movement, excess tearing of eyes, forward falling over on walking with resulting increase in gait, difficulty keeping eyes open, drooling at the corners of the mouth, generalized tiredness and what the patient describes as no happiness*'—for two years he has been noticing that. The testimony



of those who knew him before say it existed at that time. That doesn't mean he was ill in the sense that he could not work, because he did work. Mr. Dragich who employed him says he employed him, and testifies from the very beginning he didn't work any different than he did at the time when he finished his service on the ship. He says it appeared to him at all times that he worked in that fashion. He says he is a big man, he is heavy, and several times from the stand he said if you look at him you will see he is a big man, he does everything slow. All the reports show obesity, he is obese, he is fat, always has been, he is slow working, so of course from the very beginning—incidentally, Mercovitch wasn't with him on the second trip. Mercovitch signed this on the basis of the first trip. And the testimony is very clear that there wasn't much difference between the first trip and the second trip. And after the second trip was over the libelant goes up to the doctors and he tells the doctors he is all right, and they examine him and they agree that he is all right, there is nothing wrong with him. He doesn't tell them this history, although they have it, certain portions of it. In fact, in the early history it is shown back in 1957—it is part of the history, if you look back you will find that it is part of the history, this same thing, which they subsequently in September 1960 diagnosed as Parkinson's. This was subsequent, in 1960. This was in here, he always had this, but even the doctors didn't know it because he still could work, and when he came in and told them, 'I could still work,' they gave him a fit-for-duty slip, because as long as he could work they let him continue to work.

This may have progressed slowly, but it wasn't any different from what he had had for years. As he himself stated, and as the doctors certified in their fit-for-duty slip, he was fit and ready to go for duty on January 18, 1960.

Now, of course, we come to this question. They say he is fit for duty, and he says he is fit for duty, but Mr. Dragich fires him, and he says he fires him because he can't do the work. The point is that he is fit for duty, for just as much duty—from Mr. Dragich's own words—as he was the day he hired him. \* \* \* But he says, then, he was a slow worker, he was big, he was heavy, he was a slow worker. And he continued to be a slow worker, and he couldn't keep up with the young fellows.

And I don't doubt but what that is perhaps correct.

Then of course that brings up this question: Can you employ a man who is a slow worker, for the fishing season, and then in the middle of the fishing season because he is just what you employed to start with, a slow man, because the other fishermen are complaining, can you fire that fellow? Can you fire him just because there are complaints about him? Can you fire him just because he is slow?

As Mr. Dragich says, he had been doing the same work, he had some complaints during the first trip, he had some complaints during the second trip, so he decided it was either to fire one man or sixteen or nine or whatever it was. So that he acceded to the demands of the others.

\* \* \*

But that doesn't mean that an entire crew of older men couldn't fish. They wouldn't catch as many fish as the younger men because they couldn't work as fast, but they still could fish. And this man could fish.

He was hired and he shouldn't have been fired. He shouldn't have been fired as long as he could go out. He felt that he could go out, the doctors felt that he could go out, they gave him a fit-for-duty slip, so he wasn't fired for cause. That is not cause.

\* \* \* He still could go out and work.

As I stated a moment ago, from Mr. Dragich's own statement, he could work just the same as he could work before, because he ended up January working about the same as he worked when he employed him in September.

So the judgment will be for the libelant for \$3,831.71, which is the amount which you have stipulated would be the wages that he would be entitled to if he is entitled to recover wages.

Mr. Karmelich: Your Honor, may I make a statement?

The Court: Yes.

Mr. Karmelich: I feel from your remarks—I may be incorrect, your Honor—that if your Honor feels there wasn't cause, that was a separate defense. The first defense was that he was not disabled. If Mr. Strika wants to recover these wages, then his cause of action is for wrongful discharge. This case is one for wages, maintenance and cure, because he was taken ill and became disabled.

The Court: This is for wages, maintenance and cure, and you have set out in this action as an issue in the case, 'Whether or not libelant fell ill while in the service of the vessel and left the vessel on account of such illness.' '2. Whether or not libelant was discharged for cause on January 18, 1960.'

\* \* \*

The two of you got together and you stipulated that the amount that he would be entitled to if he is entitled to wages is \$3,831.71. What can be clearer than that?

Mr. Karmelich: Your Honor, may I say something further?

The Court: Yes.

Mr. Karmelich: The theory of the Complaint was wages, maintenance, and cure. The allegations of the Answer denied that this man was taken ill. The allegation of the Complaint is that this man is entitled to wages because he was taken ill. As an affirmative defense we do state this man wasn't taken ill, this man was discharged. There is no prayer, concerning the Complaint, that this man was seeking wages under any other theory than because of the fact that he was taken ill.

The Court: He is entitled to his wages if he was improperly discharged.

Mr. Karmelich: But that was not the Complaint. There is no cause of action—

The Court: In other words, you are saying, in effect, that I am wrong when I say there is a distinction between his discharge because he had the same affliction at the time he was dis-



charged that he had during the period when he was employed. You are making the argument for Mr. Finkel? Maybe it is right. Maybe I will take it under submission and think it over. If he is entitled to all of it, he is entitled to this. If it can be said that the discharge was improper, that he didn't have a right to discharge him, because—let me say that he did have a right to discharge him because of his slowdown, then his slowdown amounted to an illness and Mr. Finkel is right. Maybe I am wrong. If I am wrong, I am wrong because I am saying that he is not entitled to it.

I thought these issues were very clearly stated, but if you say that I can only determine it on that theory, then of course I do and will determine that the slowdown was an illness and therefore that he was ill at the time; and if he is ill he is entitled to maintenance.

All right. I will take it under submission.  
\* \* \*''

The District Court thereafter made findings of fact and conclusions of law to the effect that, among other things, libelant fell ill while in the service of the "U. S. LIBERATOR" and left said vessel on account of said illness and that libelant was not discharged for cause from said vessel by respondents on January 18, 1960. Based on the foregoing the District Court concluded that libelant was entitled to judgment against respondents and decreed that he recover from respondents for maintenance and wages for the remainder of his employment tenure aboard the vessel, and judgment in accordance with the foregoing was duly entered.



The error assigned by respondents and the sole error to be considered in this brief is that the District Court erred in its findings of fact and conclusions of law. Respondents contend that under the evidence presented at the trial the material allegations of libelant's libel and the pre-trial stipulation and conference order to the effect that libelant fell ill while in the service of the vessel and left the vessel on account of such illness is contrary to the evidence and is completely unsupported by the evidence introduced at the trial which was totally insufficient to show that libelant fell ill while in the service of the "U. S. LIBERATOR", and there is no evidence to sustain the judgment of the District Court herein. Respondents further contend that under the evidence presented at the trial the material allegations of respondents in the pre-trial conference order to the effect that libelant did not fall ill in the service of the vessel and did not leave the vessel on account of such alleged illness, but rather, was discharged for cause on January 18, 1960, were established and proved without contradiction. Respondents contend that the District Court, therefore, erred in not making direct findings in favor of respondents on those issues, and because of this failure the District Court erred in its resulting conclusions of law. Respondents take the position that as they were entitled to direct findings of fact in their favor on the above issues and that under the required findings of fact the resulting conclusions of law and judgment should have been in their favor, and, therefore, the material portions of the record will be the sum-

mary of the evidence bearing on the foregoing allegation of libelant and the defense interposed by respondents and the findings of fact, conclusions of law and the judgment of the District Court below.

### Findings of Fact.

The District Court found, among other things, that:

1. Libelant fell ill while in the service of the "U. S. LIBERATOR" and left said vessel on account of said illness. And,

2. Libelant was not discharged for cause from said vessel by respondents on January 18, 1960. [T. R. pp. 11-12.]

### Conclusions of Law.

From the findings the District Court made the following conclusions of law:

#### I.

Libelant is entitled to judgment against respondents decreeing that he recover from respondents \$1,440.00 for maintenance, plus interest in the amount of \$50.40; and wages for the remainder of libelant's employment tenture aboard the "U. S. LIBERATOR" in the amount of \$3,831.78 plus interest in the amount of \$101.16. Libelant is entitled to judgment against respondents in the total amount of \$5,423.34. [T. R. pp. 12-13.]

### Judgment.

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, and adjudged and decreed that libelant recover from respondents the sum of \$5,423.23, together with costs amounting to \$.....  
[T. R. p. 13.]

### Specification of Errors Relied On.

#### I.

The District Court erred in its findings of fact and conclusions of law, in not making a direct finding in favor respondents on the issue of whether or not libelant fell ill while in the service of the "U. S. LIBERATOR" and left said vessel on account of said illness, as an affirmative finding on this issue is completely unsupported by the evidence introduced at the trial.

#### II.

The District Court erred in its findings of fact and conclusions of law, in not making a direct finding in favor of respondents on the issue of the affirmative defense interposed by respondents in the pre-trial stipulation and conference order, to the effect that libelant was discharged for cause from said vessel on January 18, 1960.

### Questions Presented.

The first question presented is whether or not a fisherman can be found to have fallen ill while in the service of the vessel where he suffered from a pre-existing Parkinson's Disease and as a result was slow in doing his work, and at the end of his second voyage was fired because the crew of younger and more vigorous men complained of his inability to do his job, where there was no showing of an aggravation of said pre-existing condition while he was in the employ of the vessel, and no accident occurred causing him injury and no illness grew measurably worse during the voyage than it had before, and immediately before signing on the ship and immediately after being discharged from the vessel libellant was certified as fit for duty by the U. S. Public Health Service.

The second question presented herein is whether or not a man who is discharged because of complaints about his slow work by his fellow crew members, though he insists that he is all right and able to work and produces a certificate from the U. S. Public Health Service certifying that he is fit for duty, which he secured on the day of his discharge, may be found to have fallen ill while in the service of the vessel though he was discharged on January 18, and his condition was not diagnosed as Parkinson's Disease until long after his discharge and this subsequent diagnosis is nowhere in the evidence connected in any way with his service on the vessel and the sluggishness and slow work existed prior to the commencement of his employment.



### Statement of the Facts.

In the interest of an orderly presentation of the issues we shall summarize here only the evidence presented at the trial bearing on the issue of whether or not libelant fell ill while in the service of the vessel and left said vessel on account of said illness and whether or not libelant was discharged for cause from said vessel by respondents on January 18, 1960, which are material in connection with respondents' assignments of error herein.

#### 1. Libelant's Testimony.

On direct examination Nikola Strika stated that he had been a fisherman for thirty years. [T. R. p. 33.] He had fished aboard the vessel "WESTERN STAR" for almost two years prior to September of 1959 when he quit and went to work for respondents. [T. R. p. 34.] He considered the respondents' vessel, the "U. S. LIBERATOR", to be a better boat than the "WESTERN STAR" because it had a sprinkler system and the fish did not have to be iced and this made it better than the "WESTERN STAR" as it was easier work. [T. R. p. 36.] Libelant states that he went on trip to Mexican waters on the "U. S. LIBERATOR" in September and October of 1959 and denies that he was sick and stated affirmatively that he did not think there was anything wrong with him and that he was working all kinds of work and was feeling all right at this time. [T. R. pp. 37-39.]

On his second trip early in December of 1959 they went fishing down past Acapulco, and during a set while he was working in 105 to 110 degree heat as stated by libelant to be "strong heat", he felt dizzy and fainted. [T. R. p. 40.] This was about 11:00 o'clock,



just before noon, and libelant was throwing porpoises out of the net into the water and pushing tuna down the hatch. [T. R. p. 41.] He and the cook were working together and when the fish were 150, 200 pounds, the two of them would throw them together and the smaller ones they would handle alone. The same day libelant experienced another attack of heat prostration, as, in his own words "Second time it was in the afternoon it happened, in strong *heat* it hit me in the head." [T. R. p. 42.] The following day while doing the same character of work at about 1:00 o'clock in the afternoon he fainted again. [T. R. pp. 45-46.] Libelant stated that he did lighter work for the next three weeks and he described his activities as follows:

"Most of the time we set, and when we don't set we probably looking for the fish. I hardly do nothing, sit and look for the fish. *If you find the fish, you set and then you work.*" [T. R. p. 47.]

When asked whether he did any light work before the fainting spells libelant gave the following response:

"Sometimes light, sometimes hard, sometimes easier, like always on a boat. You don't work hard all the time. Sometimes hard, sometimes easy." [T. R. p. 48.]

Mr. Strika stated that he had never been sick in his life, but he admitted that he felt *different* than when he was a young man, stating that "You cannot feel when you were young. You begin to feel *different*, that is true. But I was good to do my work, to do my job." [T. R. p. 49.] He described the way he felt *different* in the in the following language: "Feel kind of a little bit slow down a little bit, things like that, that is coming, that gets you, you are little different." [T. R. p. 49.]

Libelant stated that the times he fainted and until the ship came into the harbor he was feeling weak, dizzy and slow of motion and that he went for a check up by a doctor the second day after they got in because he was trying to go out fishing, and feeling pretty fair and he stated that the skipper told him he couldn't have him on the boat because he was sick and he ought to see a doctor. Libelant testified that he saw the doctor all of February and on February 29, 1960, he was sent to the Marine Hospital in San Francisco where he spent five weeks and eight doctors examined him and diagnosed his condition for the first time as Parkinson's Disease. [T. R. pp. 50-52.]

#### Cross-Examination of Libelant.

Libelant went to the U. S. Public Health Department for the first time on January 18, 1960, and at that time still wanted to go fishing and told them nothing and received a "Fit for Duty" card that first time. He then showed the card to Joe Dragich and told him that he was okay and wanted to go fishing and he stated that he was told "Nikola, you are a sick man, you better go see doctor. You cannot fish, you are a sick man." [T. R. p. 58.]

#### Redirect Examination.

After the boat got back to the harbor at the end of the second trip libelant was told that he couldn't stay on the boat because he couldn't do the work and he told Joe he wanted to go fishing with him and that he felt all right. That he thereafter went to get a general examination because he wanted to prove that he was all right to Joe Dragich who had told him that he was sick and that he couldn't do the work and that he should go to the doctor. He returned and showed the "Fit

for Duty” slip to Mr. Dragich, but was told that he didn’t believe it and was advised by Mr. Dragich to see another doctor. [T. R. pp. 61-62.]

Further Direct Examination.

Libelant was asked: “At any time during your voyage, either of your two trips, did you ever feel any physical changes taking place?” And he answered as follows: “I feel a little bit like this, slow down, you know how it is.” He stated he felt the worst on the second trip. [T. R. p. 70.]

Recross-Examination.

On recross-examination the following occurred [T. R. p. 71]:

“Q. Mr. Strika, you stated you felt worse on the second trip. You didn’t feel good on the first trip, either, did you? A. I felt pretty good. I was doing my work.

Q. You say you felt pretty good? A. I feel all right.

Q. What was wrong with you? A. There was nothing wrong, I guess.

Q. You said you felt worse on the second trip. Now, what was wrong with you physically on the first trip? A. There was nothing wrong, I don’t think so. Just I feel a little slow.

Q. You felt a little slow? A. Yes.

Q. What made you feel a little slow? A. I don’t know.”

Mr. Strika again affirmed that on January 18, he went to the U. S. Public Health doctors in San Pedro, California, and that he went there for one purpose—to prove to Mr. Dragich that he could handle the job. [T. R. p. 74.]

2. Testimony of Rudolf F. Kuzmanich.

Direct Examination.

Mr. Kuzmanich testifying as a witness on behalf of libelant stated that as he recalled Mr. Strika was engaged in working on the cork pile and that he also engaged *all the rest of the activities* on board the boat that involved any of the process of fishing during the fishing trip late in September, 1959. [T. R. p. 78.]

The witness stated that he remembered that libelant on the second trip was doing initially the same work he started out with on the first trip, working on the corks and that when approximately a third of the way through this second trip it was changed to another type of work. They had been fishing somewhere off Acapulco and the temperature was roughly 95 to 100 degrees when working in the day time and he stated that Mr. Strika was overcome with *heat prostration*. After they finished the set he observed Mr. Strika lying on top of a hatch cover and observed that he looked "like he was one step from death". [T. R. pp. 80-81.]

With reference to the second trip the witness observed that libelant's physical movements were very laborious and that observing him it seemed laborious for him to move and he had trouble getting around to such a degree that it was noticeable. Referring back to the first trip, the witness stated that with regard to the movements or physical appearance of Mr. Strika, that he recalled and remembered him as a big man who moved slowly, who did not have the reactions of a quick, young man; a big man who was strong and big. He stated that on the first trip he had complained about Strika. [T. R. p. 83.]



Mr. Kuzmanich stated that he had heard others complain about Mr. Strika with respect to his work during the first trip of the vessel and he recalled that the complaints he heard concerned slowness of movement basically. [T. R. pp. 84-85.]

The witness stated that he had signed a letter which was a statement that the crew members wanted Strika off the boat because he could not handle the job of fishing. [T. R. p. 87.]

### Cross-Examination of Mr. Kuzmanich.

The witness admitted that he was presently suing Mr. Dragich. He had noticed libelant lighting a cigarette and observed that it would be slower than an ordinary person lighting a cigarette. He did not remember whether libelant would drool with saliva coming down the lower part of his mouth and onto his chin, but he did know that he was slower when he lit his cigarette and he noticed this throughout the first trip. [T. R. p. 92.]

### 3. Testimony of Joseph P. Dragich.

Mr. Dragich stated that he was one of the respondents, a part owner of the "U. S. LIBERATOR", and master of the vessel. He stated that he had seen the document designated as Respondent's Exhibit A for the first time when his crew demanded that he relieve Mr. Strika of duties on board the second trip. [T. R. pp. 94-95.]

He stated that he had known Mr. Strika for five or six years prior to hiring him and that he didn't think that there was any change in Mr. Strika's speech during this time and that his movements were always slow because he has been always a heavy man. [T. R. p. 96.]



He had observed the libelant during the three days it took them to get to the fishing grounds and he observed that he walked his usual slow walk, observing that he is sure-footed, and he stated that he observed that when Mr. Strika attempted to light a cigarette he had to light a second match many times because of the shaking of his hand and he noticed saliva coming out of the corners of his mouth. He didn't pay too much attention to this during the first trip until one of the members of the crew drew it to his attention. He stated that during the first trip his crew members complained to him about the work that Mr. Strika was doing. [T. R. p. 97.] Mr. Strika had insisted on taking care of the corks but as he could not stand up under the pace that the youngsters put up for him, he had to change him to the web for awhile. He couldn't even hold that up so he changed him to the lead line, then on the first trip he put him on the hook, taking care of the hook and the strap for awhile. [T. R. p. 98.]

He stated that he had a discussion with libelant after the crew had called the fainting incident to his attention and that Mr. Strika had said to him "It is nothing, it is just too darn hot down here," noting that the first trip was about 1200 miles further to the northwest and colder weather which did not bother libelant, he stated that libelant continued "That dog-gone heat down there, it is too much for me, I can't take it." He stated that Mr. Strika told him, "Right

now all I have got is a headache.” Mr. Dragich stated that the actions of libelant and his work were no different after than they were before the report of the fainting was made to him. [T. R. pp. 100-101.]

At the completion of the second trip, after they had unloaded the fish the witness stated that he was reluctant to let libelant go and that he told him that that was it, that he couldn't carry on, or else he had to stay up with the rest of the crew. [T. R. p. 101.] He stated that the following day when the crew presented him with the note signed by them he was forced to relieve libelant of his duties for it was either that or lose the rest of his crew which would be hard to replace. Thereafter libelant came up to him and stated that he had been to a doctor and presented a slip saying he could go fishing and was fit for duty but the witness stated he told him that he was sorry and showed him the paper signed by the crew stating “Whether you are fit for duty or not, it is easier to find one man than it is to find another ten.” [T. R. pp. 102-103.]

#### Cross-Examination of Joseph P. Dragich.

During the cross-examination of Mr. Dragich the following transpired:

“Q. Did you have occasion to observe his physical movements after that fainting report? A. Approximately the same as before.

Q. Will you describe the physical movements that you saw, please? A. I have already described one incident. I don't know how much more you

want me to. But his movements were identical to those of the first or the second trip.” [T. R. p. 109.]

Mr. Dragich then stated that he had talked to libelant about the complaints of the crew members while they were coming in on the vessel on the first trip and he stated that he had observed Mr. Strika drooling on the first trip after they were out about a week and someone called it to his attention, stating that he thought after dinner it was more noticeable than any time of the day. He also stated that he noticed that he had a glassy stare, and that to the best of his ability, as far back as he could recall him he always had that. He stated that aside from his stutter the libelant always sort of was dragging his words out except when singing, stating that he used to be quite a singer, but that was probably four or five years ago. [T. R. pp. 111-112.]

#### 4. Testimony of Nicholas A. Mirkovich.

Mr. Mirkovich testifying as a witness on behalf of respondents, stated that he had been on the first voyage of the vessel and that he had not been aboard the vessel on the second trip which ended on January 13, 1960, and that during that first trip of the vessel he had noticed Mr. Strika aboard and observed that his movements were slow and that it would take him a little time longer to strike a match and light a cigarette and that sometimes he would drool saliva down his lower lip when he would take cigarette from his mouth. When

asked whether or not he complained about the work of Mr. Strika during the trip he responded that it was just slow, it was hard to keep up—it's hard for everybody else when one guy can't keep up and that this slowness prevented the rapidity of bringing in the net. [T. R. p. 114.]

The witness stated that as he remembered Mr. Strika was working on the corks during the first trip and he remembered seeing another crew member working on the corks once but didn't remember how often because he didn't pay much attention and had forgotten and couldn't recall whether libelant had ever handled the hook or the lead line or the web. [T. R. p. 115.]

The witness stated that he had signed respondent's Exhibit A after the second trip, but that he had not made the second trip because he had stayed home for one trip because he was being examined to be inducted and had his cousin take the trip in his place, but not being inducted he had returned to the vessel. He stated that he signed the document because of his observation of libelant on the first trip. [T. R. pp. 115-116.]



### **Respondents' Exhibit A.**

This document is the precipitating cause of libelant's discharge by respondents and it is merely a piece of paper with the statement to the effect that Nikola Strika is not capable of doing his work and we urge the skipper to relieve him of his duties. And this in turn is signed by the various crew members on the "U.S. LIBERATOR."

### **Libelant's Exhibit I—U. S. Public Health Service Medical Reports.**

Libelant's Exhibit I is made up of two parts, the first part of the Exhibit being the medical reports covering Nikola Strika, libelant, from the period from January 1960 through to the time of the trial, and the second part being the records concerning Nikola Strika prior to January 18, 1960.

It should be particularly noted that the records indicate that as early as February 27, 1958, a doctor during an examination of Nikola Strika noted that libelant had a peculiar stare and an expressionless face.

As the complete record comprising libelant's Exhibit I in evidence is part of the record on appeal and is by its nature a terse form of report, no attempt will be made to summarize same here as it is felt that paraphrasing same would be of little value to this Court. The report speaks for itself and it should be read in its entirety and in its original form.



## Argument.

### I.

The District Court erred in its findings of fact and conclusions of law in not making a direct finding in favor of respondents on the issue of whether or not libelant fell ill while in the service of the "U. S. LIBERATOR" and left said vessel on account of said illness, as an affirmative finding on this issue is completely unsupported by the evidence introduced at the trial.

### II.

The District Court erred in its findings of fact and conclusions of law, in not making a direct finding in favor of respondents on the issue of the affirmative defense interposed by respondents in the pre-trial stipulation and conference order, to the effect that libelant was discharged (for cause) from said vessel on January 18, 1960.

As the second error above can be disposed of quickly, it will be treated first in the argument herein.

#### A. Introduction.

In his petition libelant seeks maintenance and wages from respondents on the ground that libelant fell ill while in the service of respondents' vessel. The Pre-Trial Order sets forth that one of the issues of fact to be litigated is "Whether or not libelant was discharged for cause on January 18, 1960." This issue was made a part of the Pre-Trial Stipulation and Conference Order for the sole reason of explaining why the libelant left the ship and to negate the claim of illness by libelant.

B. Was Libelant Discharged on January 18, 1960, for a Cause Other Than Libelant's Having Fallen Ill While in the Service of the Vessel?

True, one of the issues of fact in the Pre-Trial Conference Order was whether or not the man was discharged for cause, but, as pointed out above, it was to negate the claim of illness of libelant, and in determining the affirmative relief sought the words "for cause" are surplusage. The most that can be said for the issue of whether this man was discharged is that this was a defense to the assertion and claim of libelant that he was taken ill and therefore left the vessel rather than leaving said vessel because he was discharged for some other cause.

When we look at and study the Pre-Trial Conference Order as a whole we must construe it as one document and not take part of the Order without relating it to the other provisions of the Order. As stated above, the Pre-Trial Order states that this is an action for maintenance and wages allegedly due by reason of the fact that libelant fell ill while employed as a fisherman by respondents. Therefore, the issues revolve around that question and the question is merely, "Was he taken ill?" or "Wasn't he taken ill?" Libelant's Exhibit I was in fact the cause for libelant being discharged as clearly established by the evidence in the case and was the reason he left the ship and not any supposed illness of libelant.

C. Libelant Was Not Taken Ill and Disabled in the Service of the Vessel so as to Entitle Him to the Benefit of Wages, Maintenance and Cure Because He Had the Same Affliction at the Time He Was Discharged That He Had During the Time When He Was Employed.

Respondents have no argument as to the established law that when a seaman (fisherman) falls ill while in the service of a vessel or is on call for duty by said vessel, he is entitled to wages, maintenance and cure. *Vitco v. Joncich*, 130 Fed. Supp. 945 (D. C. Cal., 1955), Affirmed 234 F. 2d 16 (C. A. 9th 1956).

In the instant case, even as the District Court noted, the evidence was to the effect that this man did not become ill during his employment aboard the vessel "U. S. LIBERATOR"; nor was his pre-existing Parkinson condition aggravated while he was in the employ of said vessel. The evidence supports the contentions of respondents that on both of the fishing trips that this libelant made he was not able to keep up with his work, but he was slow. This was true not only on the second voyage but likewise on the first voyage and the evidence shows that this man's work was the same on both voyages. On the first voyage the crew complained of libelant's work, as they did on the second voyage. Libelant himself testified that he felt there was nothing wrong with him and that he could continue working. He impressed this fact upon respondent Dragich, but despite his protestations, Mr. Dragich stated that his work was not satisfactory and that the crew was complaining and did not want to carry him along.

This man had a pre-existing Parkinson Disease and as the Public Health record disclose [libelant's Ex. I], this man man complained prior to his employment aboard the "U. S. LIBERATOR" of sluggishness, etc. This pre-existing disease slowed libelant's activities down to a point where he could not keep up with younger fishermen. This is evidenced by the fact that the crew of the "U. S. LIBERATOR" complained of his activities on the first trip. This slowness or failure to keep up with the rest of the crew did not occur subsequent to his fainting spell on the second trip, which did not constitute or amount to an illness and had nothing to do with the Parkinson syndrome or disease, but was merely heat prostration brought about by strenuous activity, but existed prior to the fainting spells. His work was no worse nor better on the second trip than it was on the first trip.

True, this Parkinson Disease was not diagnosed as such until this man left the employ of the vessel, but his slowness of movement and physical limitations were manifested long prior to the date that the Parkinson Disease was diagnosed. It is submitted, therefore, that unsupported by evidence or testimony that he fell ill in or as the result of his services aboard respondents' vessel, the mere fact that he was declared unfit for duty approximately four days after leaving the vessel supports no more than a speculative inference that he may have become ill in the service of the vessel. It is submitted that standing alone, such an inference is grossly inadequate to establish liability for respondents.

See *James Ray Joslin v. Steamship Duncan Bay, et al.*, 1958 A. M. C. 994 (Northern District of California, Southern Division, February 4, 1958).



In the *Joslin v. Steamship Duncan Bay* case, Joslin the libelant, within a day or so after he left the employ of the respondent's vessel, began receiving treatment again for an ailment of long standing and for which he had a long history of treatment prior to service aboard respondent's vessel. However, Joslin had apparently received no treatment for this ailment for some time prior to joining respondent's vessel, during which time he served aboard other vessels. The records divulged no history of illness aboard the other vessels either. Joslin was apparently fit for duty upon joining these other vessels and also upon joining respondent's vessel. There was no evidence on the *Joslin* case of his having been ill while on the service of respondent's vessel or of his having received any treatment after quitting the vessel, at least for any illness which may have arisen during his service aboard. The court in the *Joslin* case concluded that respondents were not liable for maintenance, and the court held, "Unsupported by testimony or documentary evidence that the seaman fell ill in or as the result of his service aboard respondent's vessel, the mere fact that he was hospitalized by United States Public Health Service within a day or two after leaving the vessel supports no more than a speculative inference that he may have become ill in the service of the ship and that his subsequent treatment resulted therefrom. Standing alone, such an inference is grossly inadequate to establish liability for vessel maintenance."

In the instant case libelant had complained to Public Health of sluggishness and slowness long prior to his employment aboard respondents' vessel. This sluggishness and slowness did not show up for the first time aboard respondents' vessel as evidenced by the

U. S. Public Health records in evidence in this matter. [Libelant's Ex. I.] Thus, it is respondents' contention that the application of maintenance and wages to a seaman should not apply in this case where no illness grew measurably worse during the voyage than it had been before.

See *John Fardy v. Trawler Comet Inc.*, 1955, A. M. C. 2100, 134 Fed. Supp. 528.

In the *Fardy v. Trawler Comet Inc.* case the court held that "This case falls squarely upon the decisions holding that a seaman is bound to disclose to a prospective employer the existence of a disease which he knows is likely to incapacitate him." The court states that it has serious reservations about the application of maintenance to a seaman shipping out of his home port and returning to that port at the end of the voyage, where no accident occurred and no illness grew measurably worse during the voyage than it had been before, and the court in that case denied liability on the part of respondents for maintenance.

In the Sixth Paragraph of libelant's First Cause of Action in the libel filed herein [T. R. pp. 4-5] libelant alleges that on or about January 18, 1960, while aboard said vessel and while acting in the course and scope of his employment as such fisherman, libelant fell ill of generalized cerebral arteriosclerosis Parkinson's secondary thereto and disastasis, and was forced to, and did, leave the vessel on or about January 18, 1960. Libelant has completely failed to sustain and carry the burden of proof on this issue as all he has shown with regard thereto is the U. S. Public Health Service medical records in evidence herein as libelant's Exhibit I, and this merely shows that he was diagnosed as having this

condition some time subsequent to his leaving the vessel and this report and the other evidence of the case shows that the condition pre-existed his employment by the respondents on the vessel "U. S. LIBERATOR". Nowhere in the entire record are the fainting spells shown to be anything but heat prostration suffered because of strenuous activity by the libelant and extreme and high heat, and no way is this connected to or related to the subsequent diagnosis of Parkinson's Disease which is claimed to be the basis of libelant's claim herein.

### Conclusion.

For the foregoing reasons, the judgment below should be reversed with directions to dismiss the petition with costs in all courts to respondents.

Respectfully submitted,

KARMELICH, FELANDO & MEPHAM,

By ROBERT J. MEPHAM,

*Proctors for Appellants.*





## APPENDIX.

### Table of Exhibits.

| <u>LIBELANT'S EXHIBITS</u>  | <u>Transcript of Record Page</u> |                |                 |
|-----------------------------|----------------------------------|----------------|-----------------|
|                             | <u>Identified</u>                | <u>Offered</u> | <u>Received</u> |
| Exhibit No. I—              |                                  |                |                 |
| U. S. Public Health         |                                  |                |                 |
| Medical Records             |                                  |                |                 |
| From 1/19/60 Hence          | 64                               | 64             | 64              |
| Exhibit No. I—              |                                  |                |                 |
| U. S. Public Health         |                                  |                |                 |
| Medical Records             |                                  |                |                 |
| Prior to 1/19/60            | 66                               | 66             | 66              |
| <u>RESPONDENTS' EXHIBIT</u> | <u>Transcript of Record Page</u> |                |                 |
|                             | <u>Identified</u>                | <u>Offered</u> | <u>Received</u> |
| Exhibit A—                  |                                  |                |                 |
| Document signed             |                                  |                |                 |
| by Crewmembers              |                                  |                |                 |
| Requesting Libelant         |                                  |                |                 |
| Be Relieved                 | 93                               | 92             | 92              |

